Supreme Court, U.S.
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No. 94-1339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

KERRY L. MALTBY,

Petitioner,

v.

MARTY WINSTON, WEST CENTRAL ILLINOIS TASK FORCE, and DEWAYNE BOND, Sheriff of Schuyler County,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT MARTY WINSTON'S BRIEF IN OPPOSITION

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

RITA M. NOVAK
Counsel of Record
JAN E. HUGHES
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659

Attorneys for Respondent Marty Winston

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QUESTIONS PRESENTED

1. Does a court of appeals employ a *de novo* standard of review when reviewing a trial court's denial of a motion for judgment as a matter of law involving the question of whether a constitutional right to be free from arrest without probable cause is clearly established such that a police officer who provides information in order to obtain an arrest warrant is entitled to qualified immunity?

2. Did the court of appeals in this matter consider all relevant precedent in finding that the police officer was entitled to judgment as a matter of law on the basis of qualified immunity?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 2

Factual Background 2

Trial Court Proceedings 6

Decision of the Court of Appeals 8

REASONS FOR DENYING THE WRIT 9

I.

A *DE NOVO* STANDARD OF REVIEW IS PROPER BECAUSE THE TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW RAISES ONLY A QUESTION OF LAW 9

II.

THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT THE ULTIMATE ISSUE OF QUALIFIED IMMUNITY IS A QUESTION OF LAW SUBJECT TO A *DE NOVO* STANDARD OF REVIEW 10

A. The Court Of Appeals' Finding That The Standard Of Review Was Not Outcome Determinative Shows That The Writ Should Not Be Granted 11

B. The Court Of Appeals Did Not Address The Issue Of Whether The Trial Court Erred In Instructing The Jury On Qualified Immunity. As Such, The Court's Decision Is Not Representative Of A Conflict In The Circuits Regarding The Role Of The Jury In These Types Of Cases . 12

C. The Court Of Appeals Correctly Found That Prior Seventh Circuit Case Law Did Not Comport With Rulings Of This Court 13

III.

THE COURT OF APPEALS CONSIDERED RELEVANT CASE LAW IN CORRECTLY DETERMINING THAT WINSTON WAS ENTITLED TO QUALIFIED IMMUNITY 15

CONCLUSION 20

TABLE OF AUTHORITIES

Cases	PAGE
Anderson v. Creighton, 483 U.S. 635 (1987)	11, 14, 15, 19
Baker v. McCollan, 443 U.S. 137 (1979)	18
Baumgartner v. United States, 322 U.S. 665 (1944)	12
Beck v. Ohio, 379 U.S. 89 (1964)	16
BeVier v. Hucal, 806 F.2d 123 (7th Cir. 1986)	18
David Copperfield's v. Haddon Advertising Agency, 897 F.2d 288 (7th Cir. 1990)	8
Elder v. Holloway, ____ U.S. ____, 114 S. Ct. 1019 (1994)	11
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	15
Henderson v. DeRobertis, 940 F.2d 1055 (7th Cir. 1991)	9
Hunter v. Bryant, 502 U.S. 224 (1991)	13, 14, 15, 16
Illinois v. Gates, 462 U.S. 213 (1983)	13, 17
Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988)	18, 19
Llaguno v. Mingey, 763 F.2d 1560 (7th Cir. 1985)	18
Mahoney v. Kesery, 976 F.2d 1054 (7th Cir. 1992)	14
Malley v. Briggs, 475 U.S. 335 (1986)	13, 14, 15, 18
Mitchell v. Forsyth, 472 U.S. 511 (1985)	14, 15, 19
Oliveira v. Mayer, 23 F.3d 642 (2nd Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995)	13
Pierson v. Ray, 386 U.S. 547 (1967)	15
Pullman-Standard v. Swint, 456 U.S. 273 (1982)	12

Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) 9

Sloman v. Tadlock, 21 F.3d 1462 (9th Cir. 1994) . 13

Tillman v. Coley, 886 F.2d 317 (11th Cir. 1989), *reh'g denied*, 893 F.2d 346 (11th Cir. 1989) .. 17

Warren v. Dwyer, 906 F.2d 70 (2nd Cir. 1990), *cert. denied*, 498 U.S. 967 (1990) 13

Webb v. City of Chester, 813 F.2d 824 (7th Cir. 1987) 10

Whiting v. Kirk, 960 F.2d 248 (1st Cir. 1992) 10

Whitley v. Seibel, 613 F.2d 682 (7th Cir. 1980) ... 18, 19

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JURISDICTION

The Court of Appeals for the Seventh Circuit entered its judgment on September 14, 1994 (App. 33). A timely petition for rehearing was denied on November 4, 1994 (App. 45). The Petition was filed in this Court on February 2, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Factual Background

On June 4, 1987, a covert investigation was conducted by agents of the West Central Illinois Task Force, a multi-jurisdictional law enforcement agency established primarily to combat the illegal sale and purchase of drugs on a state-wide basis (R. Doc. 218, p. 2). That day, Inspector Marty Winston, a Task Force agent, received a tip from Anthony Hankins, a confidential source, who had become an informant with the Task Force in April of 1987 and had supplied information in three other undercover drug transactions in late 1986 and early 1987 (Tr. 29). Winston considered Hankins a reliable source based on the accuracy of the prior information provided by him and based on information given to him by the state Department of Criminal Investigation (Tr. 125, 281-282, 582).

Hankins told Winston that a man named Kerry Maltby would be at the Dairy Queen in Rushville, Illinois, at approximately 6:00 p.m. in a brown Ford prepared to sell drugs (Tr. 128, 198). Hankins knew Maltby personally (R. Doc. 72, Exhibit A, p. 13). Winston reported this information to his supervisor, Sergeant Kempf, who was to be the supervisor of the undercover drug purchase (Tr. 191-192, 279-280).

The Task Force agents arranged for Inspector Sage, the undercover agent, to pick up Hankins at 6:00 p.m. in Rushville (Defendant's Exhibit 3, p. 2). The agents did not plan to arrest Maltby after the transaction, because they hoped to conduct more drug transactions with him (Tr. 47, 201-202). Delayed arrest was the method most frequently used by the Task Force in its undercover drug investigations (Tr. 94, 229). After Inspector Sage picked

up Hankins, Sage advised the agents that he and Hankins were to meet Kerry Maltby at the Dairy Queen parking lot and that Maltby was going to be driving a brown Ford (*Id.*).

The agents conducting surveillance observed the undercover vehicle pull into the Dairy Queen lot and park next to a brown Ford with a male inside (*Id.*). Inspector Winston was positioned in surveillance approximately 200 feet from the parked vehicles (Tr. 45). Inspector Sage left his car and approached the brown Ford (Tr. 161). Hankins introduced the person in the Ford to Sage as "Kerry" (Tr. 191). Through the car window, Sage viewed Maltby's face, the front portion of his body and his arms (Tr. 160-162). Sage purchased what purported to be LSD and inquired about purchasing marijuana (Tr. 164-165, 196). During the approximately thirteen minutes of the undercover purchase, Maltby never left the brown Ford (Tr. 160-161).

After the transaction, the brown Ford left the Dairy Queen parking lot and drove past Inspector Winston in his surveillance position (Tr. 133-134). At a distance of approximately thirty feet, Inspector Winston observed the driver of the brown Ford as he slowly drove by (Tr. 127, 134, 582). Within the hour, Inspector Sage met with Task Force agents and showed them what purported to be 1.1 grams of LSD and informed the agents that the purchase had been made from Kerry Maltby (Tr. 583-584). Winston later learned that the brown Ford was registered to Virgil Riley of Beardstown, Illinois (Plaintiff's Exhibit 24, p. 2).

Between June 5 and 8, 1987, Chestnut, a suspect involved in prior marijuana purchases set up by Hankins with the Task Force, contacted Inspector Sage in his undercover capacity to arrange a drug purchase (Tr. 168). Chestnut told Sage that if the drug sale took place, he intended to attempt to split the money from the sale with

Hankins (Tr. 170). Inspector Sage did not believe what Chestnut said about Hankins, but he informed the Task Force of his comments (Tr. 179, 207). If Hankins ever was to receive money in such an undercover transaction, it would have violated his confidential source agreement with the Task Force (Tr. 55).

On June 8, 1987, the final undercover purchase with Chestnut was scheduled to take place, after which the Task Force planned to arrest him (Tr. 49). Prior to the arrest, Inspector Winston told Hankins of Chestnut's intended attempt to split the money with Hankins (Tr. 50, 53). The day of Chestnut's arrest, Hankins did not participate in the transaction or the arrest and left town (Tr. 56-57).

Because Hankins was no longer available to set up undercover drug purchases with Maltby, it became clear that no further purchases could be made as planned (Tr. 56). Therefore, Winston brought Maltby in for questioning regarding the Dairy Queen incident hoping to convince him to become an informant (Tr. 62-63). At the meeting, Maltby denied knowledge of the Dairy Queen transaction and declined to be an informant (*Id.*).

Approximately one week later, on August 6, 1992, after consulting with Sergeant Kempf, Inspector Winston provided information on the Dairy Queen incident to the State's Attorney in order to obtain a warrant for Maltby's arrest (Tr. 65-66, 109, 544, 548-549, 585). Winston's application was based upon his own observations of the Dairy Queen transaction, the information supplied by the confidential source, Inspector Sage's incident report, and Winston's identification of Maltby the week before (Tr. 23, 585).

The State's Attorney presented this information to a circuit court judge, who, finding probable cause that a

crime had been committed by Maltby, issued a warrant for his arrest (Tr. 545). On August 7, 1987, Maltby was arrested pursuant to that warrant by non-Task Force officers (Tr. 24-25, 109, 559, 584).

At the preliminary hearing, the State's Attorney, as was her practice, called only one police officer to testify to establish probable cause (Tr. 528). Inspector Winston testified that he got a good look at the man who sold Inspector Sage the purported LSD and that man was the defendant, Kerry Maltby (R. Doc. 72, Exhibit A, p. 14). Although three people were present at the hearing who sought to provide an alibi for Maltby, his counsel presented no witnesses (Tr. 385-386). The circuit court found probable cause to hold Maltby over for trial on the charges (Defendant's Exhibit 3).

After the preliminary hearing, Maltby's attorney and the State's Attorney spoke briefly, and the State's Attorney was advised of the alibi witnesses (Tr. 532). She then requested Inspector Winston to check out the witnesses' statements in preparation for trial (Tr. 74-75, 533). Some time later, Inspector Winston interviewed one of the witnesses, who said that Maltby had been working for him the day of the Dairy Queen incident (Tr. 75). The inspector prepared no written report of the statements, and the State's Attorney received no report (Tr. 75, 539).

At a pre-trial conference, Maltby declined a plea bargain, and the case went to trial (Tr. 535-536). On October 6, 1987, in preparation for trial, Inspector Winston requested Inspector Sage to view a mug shot of Maltby (Tr. 148-149). Due to the poor quality of the photograph, however, he could not discern whether the photo was of the man from whom he bought the purported controlled substance at the Dairy Queen (Tr. 148-149, 150). Inspector

Sage requested to view the suspect in person at the jail (Tr. 540).

Inspector Winston then went to the State's Attorney's office to advise her of Sage's request (Tr. 539). According to the State's Attorney, prior to October 6, 1987, "there was never any information that there was any wrongful identification of Mr. Maltby." (Tr. 540).

After Winston's meeting with the State's Attorney, the inspectors went directly to the Fulton County jail so that Sage could view Maltby in person through a one-way glass (Tr. 150, 539-540, 542, 548). Upon viewing Maltby for approximately three seconds, Inspector Sage told Inspector Winston that Maltby was not the man from whom he had bought the purported drugs in the Dairy Queen parking lot (Tr. 153-154). Sage stated: "I couldn't swear that was the individual I bought it from, so I would have to say no, it wasn't." (Tr. 154). Sage observed that the suspect in the Dairy Queen transaction had acne and no tattoos on his arms, whereas Maltby had tattoos but no acne (Tr. 151-152).

On the same day, Inspector Winston notified the State's Attorney of Sage's lack of identification (Tr. 548). The State's Attorney telephoned the judge, who authorized her to contact the jail and effect Maltby's immediate release (Tr. 26-28, 110, 548).

Trial Court Proceedings

Maltby filed this action for false arrest and false imprisonment in violation of his constitutional rights under 42 U.S.C. § 1983 against Schuyler County Sheriff Dewayne Bond, the Task Force, and Marty Winston (R. Docs. 1, 33). The trial court later denied Inspector Winston's mo-

tion for summary judgment on the issue of qualified immunity (R. Docs. 71-72, 135, 159).

At the close of Maltby's case in chief, the trial court granted Sheriff Bond's motion for judgment as a matter of law (Tr. 614). On the same date, Inspector Winston and the Task Force also moved for judgment as a matter of law (Tr. 614-615). Inspector Winston also raised his claim to qualified immunity; however, the court denied the motions because "[i]t seems to me that we have adequate evidence in here that it becomes a question of fact for this jury." (Tr. 615). Winston's counsel stated that she believed the question of immunity was "only for the Court." (*Id.*). In response, the court stated "That's still a viable one." (*Id.*).

After closing arguments of counsel, the court submitted the instructions to the jury (Tr. 689-703). The court instructed the jury, *inter alia*, that:

> The issue of a warrant for Plaintiff's arrest protects Defendants from liability unless a reasonably well-trained police officer in Winston's position would have known that his affidavit or testimony failed to establish probable cause, and that he should not have applied for the warrant.

(Tr. 693-694).

The jury returned verdicts in favor of Maltby and against Inspector Winston and awarded Maltby $50,000 in compensatory damages and $2,300 in punitive damages (R. Docs. 222-223, 226-227). On March 5, 1992, Winston moved for judgment as a matter of law, or in the alternative, for a new trial (R. Docs. 230-231). Winston argued that the evidence established at trial demonstrated the existence of probable cause, that even if there was no probable cause, Winston was protected by the doctrine of qualified immunity, that the court committed error in sub-

mitting the qualified immunity question to the jury, and that the jury had otherwise been improperly instructed (R. Doc. 230). The motions were denied by the court on March 10, 1992 (*Id.*).

Decision Of The Court Of Appeals

The court of appeals found that, "[a]lthough the standard of review is certainly not outcome determinative, we believe that the issue of whether a constitutional right to be free from arrest without probable cause, is clearly established in a sufficiently particularized manner is a question of law we review de novo." (App. 12). The court analyzed other Seventh Circuit cases that had held that the standard of review for denials of qualified immunity when probable cause is at issue is clearly erroneous and found that those cases did not comport with rulings of this Court (App. 12-14 n.7). The court of appeals explicitly stated that its opinion did not address the issue of whether the trial court erred in instructing the jury on qualified immunity (App. 18 n.12).

Looking at what was known to Inspector Winston at the time he applied for the warrant, the court found that the following facts supported a finding that Maltby was the person who sold the look-alike substance to Inspector Sage: Hankins' statement that the man selling the drugs would be Kerry Maltby; Hankins' information that the seller would arrive in a brown Ford; Winston's observation of a male parked in a brown Ford in the Dairy Queen parking lot; Hankins' introduction of the man as Kerry; Winston's observation of the undercover purchase; Winston's observation of the man in the Ford driving past him; Inspector Sage's report of purchasing LSD from Kerry Maltby; and Winston's viewing of Maltby face-to-face after the incident (App. 14-15).

The court of appeals found that it was incumbent upon Maltby to prove that it was readily apparent to Inspector Winston, given the law of probable cause in existence at the time, that his actions were unlawful (App. 17). The court concluded that Inspector Winston was entitled to qualified immunity because a reasonable police officer in Winston's position could have determined that Maltby committed the crime (App. 17-18).

REASONS FOR DENYING THE WRIT

I.

A *DE NOVO* STANDARD OF REVIEW IS PROPER BECAUSE THE TRIAL COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW RAISES ONLY A QUESTION OF LAW

Following the jury trial, Inspector Winston moved for judgment as a matter of law on the basis of qualified immunity (R. Docs. 230-231). The district court denied the motion (*Id.*). It is well settled that the trial court's resolution of a motion for judgment as a matter of law raises only a question of law, which is subject to *de novo* review. *Henderson v. DeRobertis*, 940 F.2d 1055, 1057 (7th Cir. 1991); *David Copperfield's v. Haddon Advertising Agency*, 897 F.2d 288, 291 (7th Cir. 1990).

The *de novo* standard of review is appropriate on review of the disposition of a post-trial motion for judgment as a matter of law because the district court was in no better position than the court of appeals in determining the merits of such a motion. *Rakovich v. Wade*, 850 F.2d 1180, 1187-1188 (7th Cir. 1988), *cert. denied*, 488 U.S. 968 (1988) (when the issue of qualified immunity arises in the judgment notwithstanding the verdict context, the district court should consider all the undisputed evidence in the

light most favorable to the non-movant and so must the appellate court). Both courts apply the same legal standard: "whether the evidence presented, combined with all the reasonable inferences permissibly drawn therefrom is sufficient to support the verdict in a light most favorable to the party against whom the motion is directed." *Webb v. City of Chester*, 813 F.2d 824, 827-828 (7th Cir. 1987).

Petitioner's claim that a more deferential standard of review should be used where the underlying question is that of qualified immunity is simply incorrect. *See Whiting v. Kirk*, 960 F.2d 248, 250 (1st Cir. 1992) (on review of the denial of a motion for judgment notwithstanding the verdict, the court of appeals stated that the determination of whether or not a party is entitled to qualified immunity is a legal decision that is reviewed on a plenary standard). Given the procedural posture of this matter, the court of appeals' use of the *de novo* standard of review was entirely proper.

II.

THE COURT OF APPEALS CORRECTLY RECOGNIZED THAT THE ULTIMATE ISSUE OF QUALIFIED IMMUNITY IS A QUESTION OF LAW SUBJECT TO A *DE NOVO* STANDARD OF REVIEW

Finding that "[a]lthough the standard of review is certainly not outcome determinative," the court of appeals employed a *de novo* standard of review to determine whether a constitutional right to be free from arrest without probable cause is clearly established in a sufficiently particularized manner (App. 12). The court correctly concluded that Winston was entitled to qualified immunity because "a reasonable officer in Inspector Winston's position, looking to our case-law on probable cause generally, could have concluded that Mr. Maltby committed the crime." (App. 17-18).

The court correctly found that qualified immunity is a question of law that is reviewed *de novo*. Recently, this Court held that whether "an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law not one of 'legal facts.' " *Elder v. Holloway*, ____ U.S. ____, 114 S. Ct. 1019, 1023 (1994). "That question of law, like the generality of such questions, must be resolved *de novo* on appeal." *Id.; see also Anderson v. Creighton*, 483 U.S. 635, 641 (1987) (application of the general rule of qualified immunity requires a determination of whether the government agent could, as a matter of law, have reasonably believed that his actions were unlawful in light of clearly established principles).

Petitioner has cited no support for his assertion that the determination of the existence of a clearly established right somehow changes from an issue of law to an issue of fact merely because some factual disputes concerning qualified immunity may need to be resolved. Qualified immunity remains a matter of law whether the district court decides the issue on a motion for summary judgment or after the trial on a motion for judgment as a matter of law, as recognized by the trial court when it found that qualified immunity was "still a viable" issue (*See* App. 6-7 n.3).

A. The Court Of Appeals' Finding That The Standard Of Review Was Not Outcome Determinative Shows That The Writ Should Not Be Granted

Where the court of appeals found that the standard of review was "certainly not outcome determinative," this case simply does not present issues to be resolved by this Court (*See* App. 12). This Court has cast doubt upon the

efficacy of determining whether an issue is one of fact or law for standard of review purposes. *Baumgartner v. United States*, 322 U.S. 665, 671 (1944) (defining issues as questions of law or fact to determine the scope of appellate review "is often not an illuminating test and is never self-executing"). The Court also has noted the "vexing nature of the distinction between questions of fact and questions of law" and has not yet established a "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Thus, although the appellate court determined that qualified immunity was a question of law subject to *de novo* review, the implication that the court would have reached the same result on these largely undisputed facts using a deferential standard indicates that the court's decision need not be disturbed.

B. The Court Of Appeals Did Not Address The Issue Of Whether The Trial Court Erred In Instructing The Jury On Qualified Immunity. As Such, The Court's Decision Is Not Representative Of A Conflict In The Circuits Regarding The Role Of The Jury In These Types Of Cases

Petitioner's contention that this case is representative of a "raging" conflict among the circuits as to the extent of the jury's involvement in deciding the issue of qualified immunity ignores the fact that the court of appeals did not address this issue (Petition at 15). Although Inspector Winston argued on appeal that the jury should not have been instructed on qualified immunity, the court of appeals explicitly declined to reach this issue (App. 18 n.12). Furthermore, Petitioner did not delineate in the briefs he filed below the theory that he now advances regarding a conflict among the circuits as to the role of the jury in cases involving qualified immunity. For example, in his petition for rehearing he claimed only that the court

of appeals' decision conflicted with Seventh Circuit case law, which had held that the appellate court should use a clearly erroneous standard of review regardless of whether judge or jury determines the immunity issue.

The absence of any analysis of the issue by the court of appeals stands in stark contrast to those cases that have dealt with this complex issue, which implicates concepts of federalism, judge-jury relations, and § 1983 policy. *See, e.g., Oliveira v. Mayer*, 23 F.3d 642, 648-650 (2nd Cir. 1994), *cert. denied*, ____ U.S. ____, 115 S. Ct. 721 (1995); *Sloman v. Tadlock*, 21 F.3d 1462, 1466-1469 (9th Cir. 1994); *Warren v. Dwyer*, 906 F.2d 70, 75-77 (2nd Cir. 1990), *cert. denied*, 498 U.S. 967 (1990). "A wise exercise of the powers confided in this Court dictates that we reserve for another day" questions that have not been pressed or passed upon below. *Illinois v. Gates*, 462 U.S. 213, 224 (1983).

C. The Court Of Appeals Correctly Found That Prior Seventh Circuit Case Law Did Not Comport With Rulings Of This Court

In *Malley v. Briggs*, 475 U.S. 335, 345 (1986), the Court created room for an immunity defense even where probable cause was lacking when it stated that the question is "whether a reasonable well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause . . . ." In *Hunter v. Bryant*, 502 U.S. 224, 228-229 (1991), the Court found that even if the public official errs in concluding that probable cause exists for an arrest, qualified immunity may apply if the decision to arrest was reasonable even if mistaken.

Petitioner's contention that the appellate court misinterpreted *Malley* and *Hunter* is untrue (Petition at 15-18). His reference to the appellate court's reliance on *Malley*

and *Hunter* neglects to mention the context within which the court discussed these cases. The appellate court acknowledged that the court in *Mahoney v. Kesery*, 976 F.2d 1054 (7th Cir. 1992), had reviewed the question of immunity using a clearly erroneous standard. The appellate court examined *Mahoney* in light of *Malley* and *Hunter* and correctly concluded that *Mahoney* was inconsistent with the rulings of these cases.

In *Mahoney*, the Seventh Circuit found that "[w]hoever makes the finding of probable cause (judge or jury), we do not review it *de novo*." *Mahoney*, 976 F.2d at 1059. The *Mahoney* court stated that the deferential standard was appropriate because when a section 1983 action centers on the existence of probable cause, the question of immunity merges with the merits. *Id.*

In rejecting the *Mahoney* reasoning and considering it a departure from existing law, the court of appeals stated that *Mahoney* did "not adequately take into account the Supreme Court authority which is binding upon this court." (App. 12-14 n.7). Citing to *Malley* and *Hunter*, the court of appeals found that the Court suggested a bifurcated analysis, i.e., an inquiry into qualified immunity separate from that of probable cause.

The court of appeals found that *Mahoney* was inconsistent with *Malley* and *Hunter* in that *Mahoney* determined that probable cause and qualified immunity merged and that the clearly erroneous standard was appropriate. The appellate court's conclusion that probable cause and qualified immunity are distinct inquiries is proper. *See Anderson*, 483 U.S. at 641 (objective reasonableness component of a Fourth Amendment violation is distinct from the objective reasonableness component of a qualified immunity defense); *Mitchell v. Forsyth*, 472 U.S. 511, 527-528 (1985) (a claim of immunity is conceptually distinct from

the merits of the plaintiff's claim that his rights have been violated). Neither *Malley* nor *Hunter* suggests that a qualified immunity determination should be reviewed on any standard other than *de novo*, contrary to Petitioner's assertion.

III.

THE COURT OF APPEALS CONSIDERED RELEVANT CASE LAW IN CORRECTLY DETERMINING THAT WINSTON WAS ENTITLED TO QUALIFIED IMMUNITY

Government officials, such as police officers, are "generally shielded from liability for civil damages as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The contours of the right must be sufficiently clear that a reasonable official would understand that his actions violate the right. *Anderson*, 483 U.S. at 640.

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley*, 475 U.S. at 341. Where a public official's duties require action in which clearly established rights are not implicated, the public interest may be better served by action taken without fear of consequences. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). Such "consequences" include liability for monetary damages and the "general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 525-526, quoting *Harlow*, 457 U.S. at 816.

The decisive fact is not that the official's position turned out to be incorrect, but that the question was open at the time he acted. *Mitchell*, 472 U.S. at 535. The court

should ask "whether the [government] agents acted reasonably under settled law in the circumstances, not whether another reasonable, or more reasonable, interpretation of the events can be constructed . . . after the fact." *Hunter*, 502 U.S. at 228. Probable cause exists if " 'at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonable trustworthy information were sufficient to warrant a prudent man in believing' " that a crime had occurred. *Id.*, quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

The court of appeals believed that a reasonable officer in Inspector Winston's position could have concluded that Maltby committed the crime "looking to our case-law on probable cause generally." (App. 18). Petitioner has not shown that the law was clearly established in a particularized manner in relation to the facts of this case.

Although Petitioner contends that the law was clearly established that information readily available to the police officer that negates the issue of probable cause is relevant in determining if the officer's determination is objectively reasonable, Petitioner fails to explain what information was readily available to Winston at the time of the arrest that would have negated probable cause or why. (Petition at 20-22). In any event, the cases he cites involve situations where the information available to the officers was essential to the determination of whether a crime had even been committed. They have no application to this case.

Petitioner also argues that the law was clearly established that the identity of the suspect must be confirmed promptly when an arrest is not made at the scene of the crime. (Petition at 22-24). The record showed that Winston, who was parked 200 feet from the car at the Dairy

Queen and saw the driver of the car at a distance of 30 feet when it went past him at a slow rate of speed, had no doubts about Maltby's identity when he sought the arrest warrant. Inspector Winston had been told by Inspector Sage that the undercover purchase had been made from Kerry Maltby. In addition, Winston brought Maltby in for questioning approximately one week before the arrest and, thus, had seen him face-to-face. The facts of this matter distinguish the case from that of *Tillman v. Coley*, 886 F.2d 317, 318 (11th Cir. 1989), *reh'g denied*, 893 F.2d 346 (11th Cir. 1989), where the arresting officer did not witness the transaction and failed to inform the magistrate who issued the warrant of his doubts about the identity of the suspect. Inspector Winston never expressed doubts about the identity of Maltby.

Petitioner also asserts that the law was established regarding probable cause in cases based on reliance on informants and that Inspector Winston should have investigated the information provided by Hankins. (Petition at 24-26). Probable cause is based upon the totality of the circumstances, such that any questions regarding reliability may be counteracted by other evidence. *Illinois v. Gates*, 462 U.S. 213 (1983). Hankins had provided accurate information in other undercover drug transactions, and the transaction at the Dairy Queen occurred almost exactly as Hankins indicated it would. Additionally, Inspector Winston was told by personnel at the state Department of Criminal Investigation that Hankins was a reliable informant. The fact that Hankins left town at a point after he was confronted with information that he was involved in illegal activity does not negate Winston's reliance on the information provided by Hankins, where the events occurring in the Dairy Queen transaction took place as Hankins indicated.

Petitioner acknowledges that selling a look-alike substance is a crime, but contends that this was a crime of such a "trivial nature" that Winston should have investigated his subjective belief as to the identity of the suspect prior to the arrest. (Petition at 26). The fact that the gravity of the offense is a consideration in the probable cause analysis when a police officer has arrested a suspect without a warrant distinguishes this case from those cited by Petitioner. *See BeVier v. Hucal*, 806 F.2d 123 (7th Cir. 1986); *Llaguno v. Mingey*, 763 F.2d 1560 (7th Cir. 1985).

Petitioner's claim that the appellate court "jettisoned" his presumption of innocence is simply frivolous. (Petition at 26-27). The Constitution does not guarantee that only the guilty will be arrested. *Baker v. McCollan*, 443 U.S. 137 (1979). The qualified immunity standard itself "gives ample room for mistaken judgments . . . ." *Malley*, 475 U.S. at 343. The court's opinion no more damages the presumption of innocence than does, for example, an indictment or a similar finding at a pre-trial hearing.

Although acknowledging that probable cause is determined at the moment the arrest is made, Petitioner argues that post-arrest evidence is relevant in this matter. (Petition at 27-28). Petitioner cites *Whitley v. Seibel*, 613 F.2d 682 (7th Cir. 1980), which holds that a police officer who intentionally misleads or misrepresents facts and circumstances to the prosecuting attorney can be found to have deprived the arrestee of liberty without due process of law. (Petition at 28). He also cites to *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988), which found that a police officer applying for a warrant may be liable where the evidence shows that the officer "systematically concealed from the prosecutors, and misrepresented to them, facts highly material to . . . the decision whether to prosecute . . . ." (*Id.*).

Petitioner's claim that *Whitley* and *Jones* constitute the clearly established law in this matter is erroneous. Petitioner argues that Inspector Winston failed to inform the State's Attorney that Inspector Sage had not viewed Maltby until the day of his release; however, Petitioner makes no claim, and indeed cannot, that Inspector Winston intentionally misled or systematically concealed information from the prosecutor.

Without citation to authority, Petitioner contends that Inspector Winston violated a clearly established constitutional right by failing to check with the "main eyewitness" in the case. (Petition at 28-29). As the court of appeals correctly noted, an officer who had witnessed a purported drug transaction and who had made an identification "could easily rationalize the shortcomings of the evidence; such a lapse at most reveals a mistake in judgment." (App. 16). This Court has recognized that "it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials . . . should not be held personally liable." *Anderson*, 483 U.S. at 641.

For purposes of qualified immunity, the decisive fact is not that the officer's "position turned out to be incorrect, but that the question was open at the time he acted." *Mitchell*, 472 U.S. at 535. The court of appeals correctly found that a reasonable officer in Inspector Winston's position could have concluded that Maltby committed the crime "looking to our case-law on probable cause generally . . . ." (App. 18). Petitioner has not shown that the court of appeals erred in finding Inspector Winston entitled to qualified immunity. There is no basis of error warranting this Court's review.

CONCLUSION

For all of the foregoing reasons, the Court should deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES E. RYAN
Attorney General of Illinois

BARBARA A. PREINER
Solicitor General of Illinois

RITA M. NOVAK
Counsel of Record
JAN E. HUGHES
Assistant Attorneys General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5659

Attorneys for Respondent
Marty Winston